

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

NEWSDAY, INC.

Employer

and

Case No. 29-UC-531

LOCAL 406, GRAPHIC COMMUNICATIONS
CONFERENCE, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner

DECISION AND ORDER

Newsday, Inc., herein called the Employer, is engaged in the publication and distribution of newspapers and the development of web sites. It is a subsidiary of the Tribune Company. Local 406, Graphic Communications Conference, International Brotherhood of Teamsters, herein called the Petitioner, the Union or Local 406, filed a unit clarification petition under Section 9(c) of the National Labor Relations Act, herein called the Act, seeking to clarify the editorial department bargaining unit to include Internet news managers, Internet news assistant managers, and senior Internet news managers,¹ collectively referred to herein as “Internet news managers.”² The Internet news managers work on the Employer’s Newsday.com web site.

A hearing was held before Henry Powell, a Hearing Officer of the Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

¹ The petition was amended during the hearing, to include the senior Internet news managers.

² The record reveals very little difference among the three job classifications the Petitioner seeks to include, apart from seniority and years of experience.

The Employer takes the position that the petition should be dismissed pursuant to *Bethlehem Steel Corporation*, 329 NLRB 243 (1999), because the Internet news manager positions have been in existence for 11 years, and the Petitioner did not seek to include them in the editorial department bargaining unit during recent contract negotiations with the Employer. The Petitioner asserts that there have been recent, substantial changes in the job descriptions of the Internet news managers, such that they now have an overwhelming community of interest with the editorial bargaining unit and lack a separate identity, necessitating the clarification of the unit to include them. In addition, the Employer contends that the senior Internet news managers are managers. The Petitioner takes the position that they are statutory employees.

At the hearing, the Petitioner's witness was Zachary Dowdy, a reporter in the editorial department bargaining unit who covers criminal justice and serves as a Union vice president for the editorial unit. Testifying on behalf of the Employer was Jonathan McCarthy, the editor of Newsday Interactive, who supervises the Internet news managers. The Hearing Officer called Robert Cassidy, who was promoted from Internet news manager to senior Internet news manager about six months before the hearing.³ Neither party filed a brief or gave a closing argument.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the further processing of this petition is not warranted. In light of this conclusion, the issue of whether senior Internet news managers

³ Cassidy was a part-time sports reporter in the editorial department bargaining unit until about 12 years ago, when he first started working on the Newsday.com web site.

are managers need not be resolved at this time. The facts and reasoning in support of my conclusions are set forth below.

FACTS

Background: The Editorial Bargaining Unit

On January 31, 1975, in Case No. 29-RC-2269, the Nassau County Printing Pressmen and Assistants' Union, Local 406, International Printing and Graphic Communications Union, AFL-CIO, herein called the 1975 Petitioner, was certified as the exclusive bargaining representative of Newsday, Inc.'s employees in the following bargaining unit:

INCLUDED: All editorial department employees of the Employer employed at or out of 550 Stewart Avenue, Garden City, New York; Union Avenue, Ronkonkoma, New York; 230 West 41st Street, New York, New York; Press Gallery, State Capitol, Albany, New York; and Washington Post Building, Washington, D.C.; as reporters; photographers; artists; editors; correspondents; specialists; critics; columnists; special writers; cartoonists; administrative assistants; secretaries; editorial assistants; editorial aids; transcribers; researchers; librarians; indexers; cutters and darkroom technicians.

EXCLUDED: The Editor; Managing Editors; Associate Editor; Assistant to the Editor; Projects Editor; Sunday Editor; Nassau Editor; Suffolk Editor; National Editor; Executive News Editor; New York Bureau Chief; Washington Bureau Chief; Albany Bureau Chief; Director of Design; Director of Photography; Director of Library and Research; Chief Photo Editor; Sports Editor; Sports News Editor; Money Editor; Living Editor; Arts and Leisure Editor; Specialists Editor; Travel Editor; Sunday Book Editor; Viewpoints Editor; Long Island Magazine Managing Editor; employees working on a part-time basis less than 20 hours per week; all other employees of the Employer working in other departments; guards and supervisors as defined in the Act.

It appears from the record that the Petitioner is a successor to the 1975 Petitioner. Since 1975, the list of job classifications included in the unit has expanded,⁴ apparently through the collective-bargaining process, and part-time employees are now included in

⁴ Some job classifications have been eliminated, such as cutters and darkroom technicians. The list of exclusions has also expanded.

the unit. At the present time, the editorial bargaining unit includes about 400 employees, all of whom work on the Employer's daily newspaper, *Newsday*. The Petitioner represents employees of the Employer in a total of six bargaining units.

The record further reflects that at some point subsequent to the certification in 1975, the Employer's main office relocated to 235 Pinelawn Road, Melville, New York. It appears from the record that the Employer continues to operate out of additional locations,⁵ the exact addresses of which were not specified.

Recent Contract Negotiations

The most recent contract negotiations regarding the editorial department bargaining unit began in September, 2005, and were completed in early January, 2006. According to Dowdy, there were about "three dozen" negotiating sessions. During these negotiations, the Petitioner did not discuss the Internet news managers with the Employer, or propose to include them in the bargaining unit.

The current collective bargaining agreement covering the editorial unit is effective from January 1, 2006, to April 1, 2010, and the previous agreement was effective April 1, 1999, to April 1, 2006. The appendices to these agreements list the job classifications within *Newsday*'s editorial department that are included in the bargaining unit, such as reporters, photographers, copy-editors, and assistant editors, and set forth the job classifications that are excluded, such as editors and bureau chiefs.

⁵ The record reveals that a *Newsday* managing editor and one of the Internet news managers work in Manhattan. The Albany bureau chief and the New York office manager are among the exclusions set forth in the current collective bargaining agreement, and the Washington correspondent(s) are on the list of inclusions.

Newsday Interactive

Administratively, the Internet news managers are assigned to Newsday Interactive, which is in charge of developing Newsday.com and a number of other web sites. Newsday Interactive is not part of the editorial department. In addition to the Internet news managers, Newsday Interactive encompasses 40 employees, including fulfillment specialists, advertising sales representatives, an editor for special projects, an interactive specialist who builds new web applications, a “business development person,” and producers.

With regard to the producers, the record reveals that until the Internet news manager titles came into existence about five years ago, the producers performed many of the production functions that are now performed by the Internet news managers. Thus, a number of Internet news managers are former producers. The record does not disclose what functions are currently performed by the producers assigned to Newsday Interactive.

McCarthy testified that there are now three Internet assistant news managers, eight Internet news managers, and two senior Internet news managers.⁶ Five years ago, there were only two individuals in the three Internet news manager job classifications.

The predecessor to Newsday Interactive was Newsday Direct.

Differences Among the Three “Internet News Manager” Titles

McCarthy testified that there is no substantive difference in the job functions of Internet news managers and Internet assistant news managers. By contrast, with regard to the senior Internet news managers, he claimed that they “take the lead” on “project

⁶ Cassidy was under the impression that he is the only senior Internet news manager, and that there are six Internet news managers and two Internet assistant news managers.

management,” on “special products for the web site,” and “if there is something big.” No definitions or specific examples were provided. McCarthy further testified that senior Internet news managers make recommendations with respect to the type of video equipment that should be utilized, but that McCarthy decides whether or not to accept these recommendations.

Although Cassidy is a senior Internet news manager, he was not specifically questioned about McCarthy’s assertions. He contended that there is no substantive difference between his job description and that of the Internet news managers or Internet assistant news managers. Although Cassidy mentioned that one night per week, he “manages all content for the web site,” the record does not reveal who assumes this responsibility on the other six nights, or what this responsibility entails.

Supervision

All Internet news managers report to Jonathan McCarthy, the editor of Newsday Interactive, either directly or through a manager who reports to him. McCarthy, in turn, reports to Tony Wills, the general manager of Newsday Interactive, who reports to Tim Knight, the publisher of Newsday.

In addition, editors in *Newsday*’s editorial department regularly assign work to the Internet news managers. For example, Cassidy testified that he is given work assignments by Debbie Krenek, a managing editor at *Newsday*, and by Diane Goldie, who “oversees the New York product, which is like a companion paper and web site to *Newsday*.” A December 16, 2004, article in Newsday.com, regarding the promotions of Debby Krenek and Debbie Henley to managing editor positions at *Newsday*, indicates that Krenek has

managerial duties both with respect to editorial department employees at Newsday, and with respect to “Internet and multi-media activities.”

Work Location

The record reflects that several years ago, the Employer began the process of moving the Internet news managers into the newsroom, so that they could sit near the editors with whom they work. Cassidy testified that he has been working in the newsroom for about a year, and that he was the last of the Internet news managers to be moved to the news room.

As was mentioned previously, one of the Internet news editors, the “on-line editor for New York,” works in Manhattan. The Newsday Interactive employees in job classifications other than Internet news manager are dispersed among the advertising department, the news room, and the field.

Skills and Functions

McCarthy contended that there have been no changes to the substantive duties of Internet news managers, or the skills they are required to have, within the past twelve months. Similarly, Cassidy surmised that his overall job duties “probably” have not changed within the last year, although he thought that they probably had changed within the past two years.

Skills required of Internet news managers

The Petitioner offered into evidence an on-line job posting for an Internet news manager. The requirements include the ability to use HTML web design software, experience working with audio and video for the Web, familiarity with Flash (animation software) and PhotoShop (image-editing software), and “solid copy-editing and writing

skills.” In addition, the job posting states, “Bachelors’ degree⁷ and/or 3-5 years of web publishing experience preferred.” McCarthy testified that he wrote this advertisement two years ago. Although he has “tweaked” the advertisement, the requirements for the job have not changed, and “solid copy-editing and writing skills” have been a requirement of the position for the five years that it has been in existence. Copy-editing involves correcting grammatical, stylistic and spelling errors, as well as some basic fact-checking.

Posting Newsday stories onto the web site

All stories published in *Newsday* are posted onto Newsday.com by the Internet news managers, who upload the stories from computer files encoded in Hermes, a type of word-processing software used by reporters in the editorial department. After coding and formatting the stories for HTML, a web-based software package, the Internet news managers enhance the stories with photographs and additional coverage, write “enticing” headlines and two-line summaries, and decide where to place the stories on the web site. The *Newsday* reporters who wrote the stories make informal suggestions to the Internet news managers regarding the presentation of their stories on the web site.

The above tasks fall under the rubric of “production work,” which was Cassidy’s primary function during his first few years working on the web site. Production work involved about 80% of his time in 1999, but it currently takes up only about 40% or 50% of his time, because a substantial portion of his time is now dedicated to producing video interviews. Cassidy “guessed” that other Internet news managers spend about 70% of their time performing non-video production work.

⁷ Cassidy testified that he has a degree in journalism, and he “believes” that most Internet news managers have journalistic backgrounds.

Writing original stories

Since breaking news appears on the web site before it appears in the newspaper, the Internet news managers also write original news stories for Newsday.com. This involves following up on story leads, as well as rewriting press releases for publication on the web site. To determine what tomorrow's news will be, the Internet news managers monitor various sources, such as other web sites operated by the Tribune Company, activity in the news room, local television and radio stations, and blogs.

Cassidy testified that because of the increasing demands of readers who want their news quickly, and the increasing competitiveness of the news industry, the Internet news managers are now generating more content and writing more news stories for Newsday.com than they did a year ago. By contrast, McCarthy claimed that there has "probably been a decrease" in the number of stories the Internet news managers write for the web site.⁸

McCarthy asserted that writing stories for the web site has "always" been part of the Internet news managers' job duties. Similarly, Cassidy conceded that the Internet news managers first started writing stories for the web site about four years ago.

Multi-media production

Cassidy testified that he does most of the multi-media production for Newsday.com, including audio and video interviews that he conducts in person, edits, and inserts on the web site. Videotaped interviews on Newsday.com sometimes form the

⁸ According to McCarthy, writing news stories is only 5% of Internet news managers' job duties. He testified that the other 95% consists of "working with the editors to make sure that we get a continuous flow of new news to the web site. So that might be if a reporter is at a hearing and he calls in a verdict to our—to the desk, to make sure that we get that up as fast as possible and that we do—we add every piece of multimedia we possibly can to it, again, whether it is polls, video, photos, all those things." In this hypothetical, McCarthy did not explain how they would "get up" the verdict without writing a news story about the verdict.

basis for stories in the newspaper, which are written either by an editorial department reporter, or by the Internet news editor who conducted the video interview. When going out into the field to do an interview, Cassidy is sometimes accompanied by editorial department employees, for reasons he did not specifically explain.

According to Cassidy, the Internet news managers first began to perform multimedia production functions in about 2000. Over the course of the past year, he has been doing more video work and less story writing. He estimated that 50% or 60% of his time is currently devoted to multi-media work, interviews and writing. In addition, he stated that three or four other Internet news managers have been trained to perform multi-media work, and are now performing some of this work. The record does not reflect when they were trained, or how much of the multi-media work is now being performed by Internet news managers other than Cassidy.

Copy-editing

Cassidy stated that for the past eight months, he has been copy-editing articles written by a reporter in the editorial department. He did not specifically indicate whether he started performing this function before or after the current collective bargaining agreement was signed, about eight months prior to his testimony, or whether any other Internet news managers assumed this function in recent months.

In his previous position as a reporter in the editorial department, Cassidy's stories were edited by a copy-editor, who was also in the editorial department.

Analytics

McCarthy testified that the Internet news managers study the analytics of the web site, which enable them to ascertain how many people are looking at the web site, what

stories they are looking at, and at what time. This enables the Internet news managers to ensure that they are making the right decisions on the placement of stories within the web site. There is no evidence of recent changes with respect to this job function.

Temporary Interchange

Cassidy testified that during the 12 years since he left the *Newsday* editorial department and started working on the Newsday.com web site, he has continued to write articles for *Newsday*. He is compensated on a freelance basis.⁹ For a number of years, several other Internet news managers have also been writing freelance articles for *Newsday*. McCarthy asserted that the first time he wrote an article for *Newsday* was in 1998, when he was a producer for the Newsday.com web site. The frequency of these freelance writing assignments has increased in 2006 for some Internet news managers, but has diminished for others.

In addition, the Internet news managers are sometimes assigned to work a full shift in the editorial department, as freelance reporters. McCarthy testified that the first time he remembered this happening was at the end of 2005. The record does not reflect how often this occurs, or whether it has occurred more frequently subsequent to the negotiation of the current collective bargaining agreement.

Permanent Transfers

McCarthy named five former members of the editorial department bargaining unit who became Internet news managers during the course of the past six years, and one individual who moved from Newsday.com to the editorial department at an unspecified

⁹ Cassidy testified that when he was a reporter assigned to the sports desk in *Newsday*'s editorial department, he was compensated as a freelancer when he wrote stories for other sections of the editorial department.

point in time. McCarthy provided the approximate time frame for just one of these transfers, estimating that it was about 1995 when Cassidy left the editorial department and became a full-time employee of Newsday Direct (the predecessor to Newsday Interactive).

Editorial Department Meetings

Cassidy testified that when he first started working on the web site, about 12 years ago, the Internet news managers (who were called “producers” at that time) took turns attending news meetings in the editorial department; Cassidy attended every third day and took notes. Their boss would then decide what story to focus on, and the producers would enhance it throughout the day with additional coverage and photographs.

Currently, according to Cassidy, the Internet news managers attend news meetings with the particular sections of the news department that they are working with, such as business or sports. The record does not reflect when this practice was first instituted.

Hours

The current collective bargaining agreement indicates that editorial department employees work a 35-hour week, five days per week, seven hours per day. Apparently, the editorial department works in three shifts; the night shift is defined in the contract as a shift starting any time between 1:00 p.m. and 10:00 p.m., and the lobster shift is defined as a shift starting between 10:00 p.m. and 7:00 a.m.

According to McCarthy, the Internet news managers currently work 35 hours per week, but will switch to a 40-hour week in September, 2006. He stated that they arrive “a little earlier than the rest of the newspaper so we open at 6:00 a.m.” Cassidy testified

that he works from 4:00 p.m. until midnight on Sunday night, and from 10:00 a.m. until at least 6:00 p.m. from Monday to Thursday.

Rates of Pay

McCarthy testified that Internet news managers' salaries range from \$41,000 per year, for the most junior Internet assistant news manager, to the "70's, maybe 80, 82," for the most experienced senior Internet news manager. However, senior Internet news manager Cassidy testified that his salary is \$67,000 per year, and the record does not reflect whether the other senior Internet news manager is more senior than he is.

The current contractual salary rates for editorial department employees vary according to job title. The rates for reporters, artists and photographers in the editorial department, which range from \$908.58 to \$1,490.76 per week, are slightly higher than those for Internet news managers.

Benefits

The parties stipulated that the Internet news managers and the editorial staff are covered by different health plans. Starting on January 1, 2007, however, they will be covered by the same plan.

DISCUSSION

It appears from the record that the Petitioner is seeking to add the Internet news managers to the editorial department bargaining unit by accretion, rather than taking the position that they belong in the unit, even in the absence of an accretion, by virtue of "performing the same basic functions as a unit classification historically ha[s] performed. *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166, 1168 (2001). In deciding

whether a new group of employees should be accreted to an existing bargaining unit without an election, the Board applies a two-pronged test:

While a mere finding of a ‘community of interest’ among affected employees may be sufficient to justify the Board’s action in defining a unit to conduct a representation election, a decision to accrete employees to a unit *without an election* requires a showing of much more. Accordingly, the Board has determined that it may issue an order to accrete employees to a preexisting bargaining unit only when the employees have ‘little or no separate group identity and thus cannot be considered to be a separate appropriate unit’ *and* the community of interest between the employees and the existing unit is ‘overwhelming.’”

Baltimore Sun Company, 257 F.3d 419, 427 (2001)(emphasis in original; quoting *Safeway Stores, Inc.*, 256 NLRB 918 (1981)) (where neither prong of this two-pronged test was met, employees in *The Baltimore Sun*’s new “Sunspot” web site department could not be accreted into a bargaining unit encompassing the newspaper’s editorial and news, commercial, and interactive-telephone-service departments). In determining whether the employees sought to be accreted share an “overwhelming community of interest” with the existing bargaining unit, the factors considered by the Board include interchange and contacts, common supervision, degree of centralized control over day-to-day operations and personnel policies, extent of functional integration, similarity of skills, functions, wages, hours, benefits and other working conditions, work location, and bargaining history. *See Super Valu Stores*, 283 NLRB 134, 136 (1987); *Save-It Discount Foods*, 263 NLRB 689, 693 (1982); *see also J.C. Penney Company, Inc.*, 328 NLRB 766 (1999); *Transerv Systems, Inc.*, 311 NLRB 766 (1993); *Allied Gear and Machine Company, Inc.*, 250 NLRB 679 (1980).

In addition, a unit clarification petition seeking to include a job classification in an existing bargaining unit is not appropriate if the job classification at issue has historically

been excluded from the unit, and has not undergone “recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt” as to whether they should continue to be excluded from the unit. *Union Electric Company*, 217 NLRB 666, 667 (1975); *see Plough, Inc.*, 203 NLRB 818 (1973). Conversely, a unit clarification petition seeking to exclude a job classification that has historically been included in the unit is not appropriate if the job classification has not undergone recent, substantial changes. *Bethlehem Steel Corporation*, 329 NLRB 243 (1999); *Arthur C. Logan Memorial Hospital*, 231 NLRB 778 (1977); *Northwest Publications, Inc.*, 200 NLRB 105 (1972); *Wallace-Murray Corporation*, 192 NLRB 1090 (1971). In sum, unit clarification is not appropriate “for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.” *Union Electric*, 217 NLRB at 667.

If a unit clarification petition seeks to include or exclude a job classification that is not new and has not undergone recent, substantial changes, there is just one relevant exception to the rule set forth above. If the parties discussed the disputed job classification during contract negotiations, and the unit clarification petitioner withdrew its position in the interests of reaching an agreement on a contract, while at the same time expressing its intention to pursue the matter “through other channels,” “through legal channels,” or through a unit clarification petition, the petition could properly be filed during the term of the current contract. *See Baltimore Sun Company*, 296 NLRB 1023

(1989); *SunarHauserman*, 273 NLRB 1176 (1984); *WNYS-TV*, 239 NLRB 170 (1978); *Massey-Ferguson, Inc.*, 202 NLRB 193 (1973).

In the instant case, although evidence was adduced regarding community-of-interest factors relevant to an accretion analysis, the record fails to establish that the three Internet news manager titles constitute a new job classification, or that there have been recent, substantial changes to the Internet news managers' job descriptions. Rather, the community of interest factors on which Petitioner relies pre-date the negotiation of the current contract, and have not undergone substantial changes since that time. The Union admitted that during the most recent contract negotiations, it did not discuss the Internet news managers with the Employer, or propose to include them in the bargaining unit.

Based on the foregoing, I find that no valid issue has been raised concerning the unit placement of the Internet news managers that is appropriate for resolution at this time in a unit clarification proceeding. Accordingly, I shall dismiss the instant petition. I further find that under these circumstances, it is unnecessary to reach the issue of whether the senior Internet news managers are managers as alleged by the Employer, or statutory employees as alleged by the Petitioner.

CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that Newsday, Inc., herein called the Employer, is a domestic corporation, with an office and place of business located at 235 Pinelawn Road,

Melville, New York,¹⁰ herein called its Melville facility, where it has been engaged in the publication and distribution of newspapers and related articles. During the past twelve month period, which period is representative of its operations in general, the Employer, in the course and conduct of its business operations, received gross annual revenues in excess of \$200,000 and purchased and received at its Melville facility, goods, supplies and materials valued in excess of \$5,000, from points located outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated that Local 406, Graphic Communications Conference, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

The labor organization involved herein claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The unit clarification petition herein was not timely filed, and hereby is dismissed.

¹⁰ As stated previously, it appears from the record that the Employer has other locations, the addresses of which were not specified on the record.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **September 19, 2006**. The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: September 5, 2006

ALVIN BLYER

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201